

**Topic 7: Effect of Pre-2015 EPA Approvals of Maine's Water Quality Standards (WQS) for Waters in Indian Lands.**

**EPA's Decision:** From 2004 until 2015, EPA expressly stated that each of its WQS approvals in Maine excluded waters in the Tribes' territories. For instance, in 2004 EPA stated:

EPA's approval of Maine's surface water standards revisions does not extend to waters that are within Indian territories and lands. EPA is taking no action to approve or disapprove the State's standards revisions with respect to those waters at this time.

In the 2015 decisions, including, among others, EPA's approvals of Maine's HHC adopted in 2006. EPA reiterated the position that these prior WQS approvals had excluded Indian country. EPA then addressed these WQS as applied to tribal waters as part of the 2015 decisions.

Prior to 2004, EPA's WQS decisions in Maine were silent regarding the Tribes and waters in their territories. In the analysis supporting the February 2, 2015 decision, EPA stated that these pre-2004 decisions also excluded Indian country. EPA's assessment was in line with the Agency's longstanding nationwide approach to applicability of state programs in Indian country. In many cases, the federal environmental laws administered by EPA authorize or require states to submit regulatory programs or standards adopted under state law to EPA for approval.<sup>1</sup> However, under established principles of federal Indian law, states generally lack civil regulatory jurisdiction in Indian country,<sup>2</sup> and since the 1970's, EPA has acknowledged this general limitation on state authority.<sup>3</sup> EPA approvals of state environmental standards and programs (particularly older approvals) often contained no express or consistent reference to Indian tribes or Indian country. For example, as was the case in Maine prior to 2004, many EPA decisions approving state WQS were silent as to Indian country. To ensure that all EPA-approved regulatory programs are grounded in adequate jurisdictional authority, EPA's nationwide approach across our statutes has been that for a state to regulate in Indian country it must expressly demonstrate its authority to do so in its program submission, and EPA must find that the state has such authority and expressly approve the state's program as applying to such areas. In other words, the state must expressly demonstrate in its program submission why the general principles limiting state jurisdiction in Indian country are inapplicable or overcome in that state, and EPA must so find. Any prior program approval not including such an express demonstration

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<sup>1</sup> See, e.g., Clean Water Act (CWA) sections 303(a), (c) (WQS) and 402(b) (permitting).

<sup>2</sup> See, e.g., *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) (“[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian Tribe inhabiting it, and not with the States.”).

<sup>3</sup> EPA has, for instance, promulgated regulations for certain environmental programs specifying that a state may obtain full program approval without covering Indian country and requiring states to affirmatively demonstrate their jurisdiction if they seek to administer a regulatory program in Indian country. See, e.g., 40 C.F.R. §§ 123.1(h), 123.23(b) (CWA section 402 permitting).

and finding would not apply in Indian country.<sup>4</sup> This approach was intended to avoid any potential jurisdictional defect in the many prior program approvals that were silent as to tribes/Indian country, while acknowledging that some states would, in their program submissions, be able to demonstrate authority granted by Congress over Indian country. In Maine, the 2015 decisions were the first to analyze (and find) the State's jurisdiction to establish WQS in the Tribes' territories.

Maine's Position:

**Ex.5 AWP / DPP / ACP**

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EPA's Response:

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